

Manring, Noah D.

From: Manring, Noah D.
Sent: Saturday, November 13, 2010 6:26 PM
To: Engel, Thomas G.
Cc: Akers, Lex A.; Barnes, Terry L.; Thompson, James E.; Foster, Brian L. (Provost); Middleton, Michael; Dean, Kenneth D.; Curry, Randy D.; Davis, Curt H.; Gahl, John M.; Gangopadhyay, Shubhra; Ho, Dominic K.; Islam, Naz; Keller, James M.; Kovaleski, Scott; Devaney, Michael J.; Nair, Satish S.; Skubic, Marjorie; Oconnell, Robert M.; Tyrer Jr, Harry W.
Subject: Suspension of teaching duties ...
Importance: High

Dear Greg:

This email is being written to inform you that the student complaints in ECE 2110 have now been moved to a formal grievance. This has resulted because you have not provided us with the conditions under which you will meet with the students, and all informal processes for resolution have failed.

As you know, the student complaints are serious ... including allegations of sexual and racial discrimination, inadequate teaching, disrespect to students, and retaliation. Professors O’Connell, Kovaleski and I met with you (and your attorney) on November 10th in hopes of informally resolving this matter. We listened to your responses, and after deliberation we unanimously concluded that you failed to adequately explain your behavior or to adequately respond to these allegations.

Of all the allegations, we are most immediately concerned about retaliation against students. In particular you waited eleven days to file charges of plagiarism against three Chinese females in your class. You filed those charges minutes after I notified you that the students had complained to me about your behavior, and that I wanted to have a meeting with you concerning this matter. Additionally you filed the charges without having retained any supporting documentation. Although you claim that you had always intended to file these charges, the above circumstances make this claim hard to believe. If you had been considering doing this, you would have retained the materials rather than handing them back to your students. In our meeting on November 10th, you asserted that you would now be filing charges of plagiarism against other students. This appears to us to be a blatant attempt to show that you were not discriminatory in your earlier actions and causes us great concern for the way you have conducted this class and for what you may do to students in the class during the remainder of the semester.

The results of our meeting with you on November 10th were discussed at a special meeting of the full professors in the department on Thursday morning, November 11th. It was the unanimous view of the faculty that to protect all the students in the class from possible retaliation, you should be relieved of your teaching duties and that an investigation of the charges should be conducted immediately.

Our concern was heightened late Thursday after having learned of your directive to all the students in ECE 2110 to turn in all past lab reports to you by next Tuesday when the class meets. These reports were the basis of the plagiarism charges.

Therefore, you are immediately removed from all teaching duties for the remainder of this semester. You are not to report to any classes on Monday, or for the remainder of the semester. Faculty replacements will be found for both of the courses (ECE 2110 and 3470) and I expect you to cooperate with these faculty members during the transition by providing them with your course syllabus, grade records, and any other material that will be useful for completing the instruction of these courses.

George S. Smith

EXHIBIT 5

From: Engel, Thomas G. [EngelT@missouri.edu]
Sent: Sunday, March 20, 2011 4:50 PM
To: George S. Smith
Subject: FW: Student Charges of Discrimination
Attachments: 11_13_Student Grievance Panel.docx

FYI

From: Dean, Kenneth D.
Sent: Sunday, March 20, 2011 1:54 PM
To: Engel, Thomas G.
Cc: Dean, Kenneth D.
Subject: Student Charges of Discrimination

Greg—

We have received charges of discrimination from four students against you . For three of the students –Wanya Gu, Wenting Zhou, Yushan Chang—the charges are discrimination based on race and national origin. For those three and one additional student—Lauren Griggs—the charge is sex discrimination. The events related to the race /national origin charge spring from the lab report grades and subsequent events beginning in late October in the ECE2110 class. The sex discrimination claim results from events related to Lauren Griggs from early October, and also events involving her and the other three women concerning grades on lab reports, in that same class. The full copy of the complaint will be delivered to you via campus mail.

My reading of the complaint is that a written and verbal apology to each student could settle the issue, as that is the remedy requested. If you are agreeable to that please let me know at your earliest convenience and I will work with the students to see if the matter can be settled. If you are not agreeable to the remedy requested, the provisions of CRR 390.010.E-F are triggered. I have set out section E below and highlighted the section that relates to the selection of the hearing committee from the full panel . The full rule can be also found at the link below.

http://www.umsystem.edu/ums/rules/collected_rules/grievance/ch390/grievance_390.010

E. Formation of Grievance Committee

1. It the Appropriate Administrative Officer's responsibility to initiate the selection of the grievance committee within fifteen (15) working days after the request for the formation of a grievance committee or after the completion of the informal hearing provided for in Section 390.010 F.5 without satisfaction to the grievant.
2. A grievance hearing panel shall be established by October 1 of each year from which a grievance committee should be constituted. The panel shall consist of ten (10) faculty, ten (10) staff and ten (10) students. Selection of the panel will be made by the Chief Student Personnel Administrator from recommendations by the appropriate faculty, staff and student associations. Selection of membership will consider sex, race, disability, academic rank, student classification and employee classification. Membership on the hearing panel shall be for two years. A member's term shall expire on September 30 of the second year unless he/she is serving at that time on a hearing committee still in the process of reviewing an unresolved grievance. In such case, the member's term shall expire as soon as the committee has submitted a written report of its findings and recommendations to the Appropriate Administrative Officer.
3. A hearing committee shall be composed of five (5) members. The grievant shall select two (2) members from the grievance hearing panel provided by the Chief Student Personnel

Administrator. The responding faculty/staff/organization shall select two (2) members from the grievance hearing panel. Both parties should have their selection made within 15 working days of the receipt of the request. The four committee members shall then select an additional member from the grievance hearing panel to serve as chair. Neither members of the immediate departmental unit nor student members of pertinent student organizations involved in the grievance shall be eligible to serve on the committee.

4. Any person selected to a grievance committee will be expected to serve on such committees and to be present at all sessions. If a member is absent from a single session, he/she will be required to review all tapes or transcribed proceedings of that session prior to the next meeting of the committee. Should a member be absent from two sessions or should a member request to be excused from service for reasons of illness, necessary absence from the campus or other hardship, then the member shall be replaced in the same manner used in the original selection (see Section 390.010 E.3). If a member is unable or ineligible to serve for whatever reason, the replacement shall review all tapes or written transcripts and all submitted evidence prior to service on the committee. Five members of the hearing committee, duly selected as in Sections 390.010 E.3 and E.4 must attend the opening and closing session of the hearing.

Attached you will find a list of the standing student grievance hearing panel for this year. If you wish to have the matter heard by a committee of the panel please send me the two names you select to serve. The students have selected Mary Shenk and Sandra Schiefer.

Please let me know if you have any questions. I look forward to hearing from you.

Ken

Kenneth D. Dean
Deputy Provost
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From: George S. Smith [gssmith@socket.net]
Sent: Sunday, April 17, 2011 5:06 PM
To: 'Foster, Brian L. (Provost)'
Cc: 'Dean, Kenneth D.'; 'Engel, Thomas G.'; 'Markie, Kathleen M.'; 'Smeda, Reid J.'; 'Watt, J W.'; 'Messer, Nat T.'; 'Overby, L. Marvin'; 'Ferris, Stephen P.'; 'Pearsall, Deborah M.'; 'Barabtarlo, Gene'
Subject: RE: Engel Faculty Irresponsibility Hearing

Provost Foster,

Your email requires a reply; not only for certain factual inaccuracies, but inaccurate interpretations of the Collected Rules and Regulations according to accepted “canons of statutory interpretation.”

First, it is an inaccurate statement of fact that Professor Engel and myself “rebuffed” an attempt by Deputy Provost Dean to reach a negotiated settlement. In fact, we both met with him and discussed both Charges of Faculty Irresponsibility that were filed against Professor Engel in a meeting that lasted almost an hour. We discussed the facts of this case, the relevant witnesses, our position and various evidentiary matters. We informed him that we considered the charges frivolous and the most prudent move was for the Provost to dismiss that charges. Accordingly, his “presentation of the case” in the second FI charge is an impermissible conflict of interest.

Second, you indicate that you have “discretion” to present the case. I must disagree. Certainly, you are well aware of the distinction between “ministerial” and “discretionary” duties. Certainly you understand the meaning of the word “shall (i.e. compulsion, obligation or necessity).” The statutory canon “*EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*”: The express mention of one thing implies the exclusion of another is most pertinent to your claim of the authority to delegate. This canon is used "[W]here special powers are expressly conferred or special methods are expressly prescribed for the exercise of power, other powers and procedures are excluded." No provision in the FI charges section of the Faculty Bylaws confers on you the discretion to delegate your ministerial duty to present the case. The express mandate that you SHALL present the case excludes any exercise of power by you to have another do what you are mandated to do.

If you fail to inform me by Thursday that you will comply with the Collected Rules and Regulations governing charges of Faculty Irresponsibility, I will promptly file a Writ of Prohibition in the Circuit Court of Boone County seeking a court order prohibiting you from delegating your ministerial duty. This will delay the hearing until such time as the Court can hear and rule on my writ.

You cite to other sections (CRR 20.020,320.020 and 320.030 A and C) that you claim impart the right to delegate your duties. Notwithstanding the fact that these sections are not part of the Faculty Bylaws, the fact that other sections give you the right to delegate and the FI section in the Faculty Bylaws does not, just reinforces the applicability of the above noted canon of statutory construction that the drafters intended in this process to not give you the right to delegate, in that said right is expressly given in other processes but not this one. If you had a blanket delegation of authority in all personnel matters, then language expressly denoting your right to delegate would be superfluous.

Third, you seem to make much of “How absurd that both sides would not be equally represented” for the accused to have an attorney present his defense, but the Administration does not have such a right. I did not write the rules, but, in fact, that is precisely what they provide for. Administration (and the committee) are granted the right to consult with counsel. Administration IS NOT given the right to have counsel present its case. Only the accused is granted this right. It seems obvious that the drafters contemplated the inherent power/expertise differential an accused would face in a formal hearing, and determined that the right of the accused to have an attorney present his/her defense balanced these inequities. In this instance, the canon of statutory construction known as the "plain meaning" rule applies. If a statute is clear and unambiguous, the court should apply the statute in accordance with its plain and ordinary meaning and should not engage in statutory construction. A statute is plain and unambiguous if its

terms are plain and clear to one of ordinary intelligence, the ordinary sense of a word being that derived from the dictionary. While you may conclude the rule is “absurd,” its plain meaning and directive is clear and unambiguous. Your attempt to delegate the presentation of the Administration’s case to a licensed attorney will also be met with a Writ of Prohibition filed in Circuit Court unless I am informed you will comply with the express language of the Faculty Irresponsibility rules by Thursday.

What you propose violates administrative and constitutional due process standards and safeguards. They are vigorously objected to and will be presented before a judicial forum unless these rules are complied with.

Respectfully,

George S. Smith, Ph.D.
Attorney for Professor Thomas Engel

From: Foster, Brian L. (Provost) [mailto:fosterbl@missouri.edu]
Sent: Friday, April 15, 2011 4:44 PM
To: gssmith@socket.net
Cc: Dean, Kenneth D.; Engel, Thomas G.; Markie, Kathleen M.; Smeda, Reid J.; Watt, J W.; Messer, Nat T.; Overby, L. Marvin; Ferris, Stephen P.; Pearsall, Deborah M.; Barabtarlo, Gene
Subject: Engel Faculty Irresponsibility Hearing

Dear Attorney Smith:

I wish to address your email of Wednesday to the Committee on Faculty Responsibility, which I have appended below.

First, Deputy Provost Dean supplied to Dr. Engel Tuesday the only document, other than a copy of section 300.010L.8, given to the committee—a redacted copy of the original charges.

Second, I do have the authority to designate Deputy Provost Dean as the person who will present the case. The CRR is silent in this particular section, neither expressly allowing nor prohibiting a delegation. When you review the entirety of 300.010.L you will note that the Provost is given discretion to act at several stages in the process (See L.5.b, L.7.a (1) and (2), L.7.b), and this statement: “*The Provost for Academic Affairs shall present the case*” is merely a further recognition of the Provost’s discretion to act in the area of “presenting the case”. The entirety of 300.010 makes it clear that I have the discretion to dismiss the case, and indeed, if I so chose, I could “present the case” at this point by deciding not to present the case. That is consistent with the CRR provision that “Generally accepted principles and procedures of administrative due process shall govern the conduct of the hearing.”

However, I do not concede that one must find express language in the CRR in every instance to permit delegation. Aside from 300.010.L providing several instances of the exercise of discretion, the CRR makes it clear that delegation is permitted, including in the area of personnel actions. Examples include, but are not limited to, the following: CRR 20.020, 320.020 and 320.030 A and C. On this campus the Chancellor has delegated to me and I have re-delegated to Deputy Provost Dean the authority to act on most personnel matters. This is clearly a personnel matter. I have delegated to him the authority to represent me in this personnel matter to “present the case”.

Third, the fact that Deputy Provost Dean happens to be an attorney is irrelevant. If I were an attorney would you assert that status would prevent me from “presenting the case”?

Fourth, you assert that the rules are designed to prevent “any unfair advantage that the Administration would have in presenting the case”, and that by having an attorney present the case is therefore an unfair advantage. You are an attorney and will be presenting the case for your client, the accused. Do you actually believe the Faculty in passing these by-laws and the Curators in approving them intended that only the accused faculty member could have an attorney present his side of the case but the accusers (via the Provost) would have to make their case without similar opportunity. How absurd that both sides would not be equally represented. There is no unfair advantage when equality exists.

Fifth, you assert that Deputy Provost Dean has acted as a mediator in this particular case. He has not. In fact the only attempt at negotiation was rebuffed by you when he offered to meet with you and your client to discuss the case, and that was rejected. He has no conflict, and knowing him as I do I have learned that he is quite sensitive to recognizing conflicts and recusing himself from matters when actual conflicts exist.

Sixth, UM Counsel Markie represents the Committee, not me, nor Deputy Provost Dean.

Finally you reference materials included in the original charges that should have been removed. The dean has redacted the material deemed to be personnel information that should not have been shared with some of the 17 faculty who signed the charges. The Committee has received the redacted charges as required by the CRR that the Committee receive “the text of the original charge.” I would also point out that these proceedings are confidential and no one beyond those who need to be involved in this process will see the documents. If you have concerns that information remains in the charges of a personnel matter not related to the charges, you have other forums to pursue those concerns.

Sincerely,
Brian Foster, Provost

From: George S. Smith [<mailto:gssmith@socket.net>]
Sent: Wednesday, April 13, 2011 12:07 PM
To: Dean, Kenneth D.; Markie, Kathleen M.; Applebaum, Marla; Smeda, Reid J.; Barabtarlo, Gene; Pearsall, Deborah M.; Ferris, Stephen P.; Overby@missouri.edu; Messer, Nat T.
Cc: Engel, Thomas G.
Subject: Engel Faculty Irresponsibility hearing

Dear Committee members, Deputy Provost Dean and UM Counsel Kathleen Markie,

Please consider this correspondence my entry of appearance as counsel of record for Professor Thomas Engel in the above noted matter set for April 29, 2011 from 1 to 5 p.m.

It has come to my attention that Deputy Provost Dean may have provided you with relevant documents in this matter. He has not provided those documents to us. Please provide me a complete set of relevant documents that the committee has been provided concerning this matter.

It has also recently come to my attention that Deputy Provost Ken Dean intends to present the case; ostensibly by virtue to Provost Foster delegating this duty to him. I cannot locate any language in Section 300.010.L which provides authority to the Provost to delegate his responsibility under this section. The language is clear and unambiguous: Section 300.010.L.8.b(1) says that: “*The Provost for Academic Affairs shall present the case.*” Any attempts by Deputy Provost Dean to present this case will be vigorously objected to and may result

in an invalid hearing. We do not consent to Deputy Provost Dean presenting the case. Not only is he a licensed attorney in Missouri, but he is a member of the law school faculty and has taught administrative law. To allow the accusers to have a licensed attorney present their case is patently unfair, procedurally flawed and not consistent with Section 300.010.L.

The rules governing the faculty irresponsibility process provide that the committee and the Provost may receive the advice of counsel. I presume that is why Kathleen Markie is a recipient of the notice of hearing email. It does not provide for the Provost to have counsel present the case (as it does for the accused). The Provost must present the case; not someone he delegates who just so happens to be a licensed attorney. Permitting Ken Dean to present the case is a patent violation of this rule. These rules are meant to protect the accused from malicious and false charges and any unfair advantage that the Administration would have in presenting the case. Furthermore, Ken Dean had been involved in negotiations between the parties; now he is going to represent the accusers and present their case? It is a clear conflict of interest for Dean to act as mediator/negotiator between the parties and thereafter to represent one of the parties. I strongly urge the committee to intervene and inform Deputy Provost Dean that his participation in this process is concluded and he must recuse himself.

Furthermore, the committee must be notified, if it has not already, that the accusers in this matter violated HR 114 by disclosing privileged and private personnel matters about Professor Engel in its "petition." We were assured that these privileged matters were redacted, but have come to learn they were not. We sought sanctions against them, but they were only "admonished" not to do it again. It is a violation of law and MU policy for privileged information to be disclosed to third parties without a court order or the express consent of the individual. Professor Engel has not provided such consent. Until we are assured that all privileged information that was included in the charge of faculty irresponsibility has been redacted prior to it being presented to the committee, this matter cannot be considered procedurally compliant.

I am most amenable to meeting with the interested persons in this matter to resolve these issues prior to the hearing date.

Respectfully Yours,

George S. Smith, Ph.D..
Attorney for Professor Engel